March 17, 2004

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: Burkhalter, Rayson & Associates

Date of Filing: February 18, 2004

Case Number: TFA-0054

On February 18, 2004 , Burkhalter, Rayson & Associates (the Appellant) filed an Appeal from a final determination issued by the Department of Energy's (DOE) Oak Ridge Operations Office (OR). In that determination, OR responded to a Request for Information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. OR released portions of a responsive document, but continued to withhold other portions of that Document under FOIA Exemptions 4 and 6. This Appeal, if granted, would require OR to release those portions of the document to the Appellant.

I. BACKGROUND

On April 27, 2002, the Appellant filed a request for information with OR seeking a number of documents. On November 22, 2002, OR issued a determination letter (the Determination Letter) releasing a number of responsive documents to the Appellant and withholding one document, "the proposal submitted by UT-Battelle, LLC, . . . that resulted in UT-Battelle, LLC, receiving the contract for [managing and operating the Oak Ridge National Laboratory]" (the Proposal), in its entirety under FOIA Exemption 3. Determination Letter at 1. On December 17, 2002, the Appellant filed an appeal of that Determination challenging OR's withholding of the Proposal. On February 13, 2003, we issued a decision and order holding that OR had improperly withheld the Proposal under Exemption 3. *Burkhalter, Rayson & Associates*, *Case No. TFA-0008*, 28 DOE ¶ 80,271 (February 13, 2003) (*Burkhalter I*). Accordingly, we remanded the matter to OR with instructions to "promptly release the Proposal to the Appellant or to provide a thorough explanation of any other justification for withholding the Proposal (or portions thereof)." *Id.*

On July 3, 2003, OR issued a new determination letter (the July 3, 2003 Determination Letter). On July 25, 2003, the Appellant filed an appeal of the July 3, 2003 Determination Letter, contending that OR had failed to identify three responsive documents, Volumes III, IV and V of the Proposal. On September 12, 2003, we issued a decision and order granting the July 3, 2003 Appeal in part and remanding the matter to OR. *Burkhalter, Rayson & Associates*, *Case No. TFA-0037*, 28 DOE ¶ 80,302 (September 12, 2003) (*Burkhalter II*). In *Burkhalter II*, we found that OR had failed to fully comply with our order in *Burkhalter I*. *Id.* Specifically, we found that OR had effectively withheld Volume III of the Proposal by improperly failing to identify it as responsive. *Id.* Accordingly, we remanded the matter to OR instructing it to promptly issue a new determination letter which "must either release to the Appellant the contents of Volume III or provide *a meaningful*

description of any portion of the contents of Volume III it determines to withhold under an appropriately justified FOIA exception." *Id.* (emphasis supplied). On January 21, 2004, OR issued a determination letter releasing a redacted copy of Volume III to the Appellant. However, OR deleted portions of this document under Exemptions 4 and 6. On February 18, 2004, the Appellant filed the present appeal. The Appellant contends that OR has improperly withheld information under Exemptions 4 and 6. Appeal at 1.

II. ANALYSIS

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d. 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). Only Exemptions 4 and 6 are at issue in the present case.

A. Exemption 4

In its January 21, 2004 Determination Letter, OR withholds portions of Volume III under Exemption 4. It indicates that the information it is withholding under Exemption 4 consists of "business-sensitive commercial information that is proprietary to [a DOE contractor and its business partners]." Determination Letter at 1. Specifically, OR claims

> Two withheld audit reports contained in Volume III, if released, would provide competitors with insight into the strengths and weaknesses of [a DOE Contractor] and its partners and reveal internal accounting practices that are proprietary to these entities. Providing a competitor with percentages, labor rates, overhead, fringe benefits, compensation data, transition cost calculation methods, and similar commercial and financial data contained throughout Volume III would cause substantial competitive harm to the competitive position of [a DOE Contractor] and its partners and reveal the strategies and methodologies employed by these entities in preparing the costing portions of proposals submitted for future government procurements.

Determination Letter at 2.

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to be withheld under Exemption 4, a document must contain either (a) trade secrets or (b) information that is "commercial" or "financial," "obtained from a person," and

"privileged or confidential." *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). If the agency determines the material is a trade secret for the purposes of the FOIA, its analysis is complete and the material may be withheld under Exemption 4. *Public Citizen Health Research Group v. Food & Drug Admin.*, 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983) (*Public Citizen*). If the material does not constitute a trade secret, the agency must then determine whether the information is"privileged or confidential." 1/

In order to determine whether the information is "confidential," the agency must first decide whether the information was either voluntarily or involuntarily submitted. If the information was voluntarily submitted, it may be withheld under Exemption 4 if the submitter would not customarily make such information available to the public. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993) (*Critical Mass*). If the information was involuntarily submitted, the agency must show that release of the information is likely to either (i) impair the government's ability to obtain necessary information in the future or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879.

It is well settled that if the DOE decides to withhold information, both the FOIA and the Department's regulations require the agency to (1) specifically identify the information it is withholding, (2) specifically identify the exemption under which it is withholding the information, and (3) provide a reasonably specific justification for its withholding. 5 U.S.C. § 552(a)(6); 10 C.F.R. § 1004.7(b)(1); *Mead Data Central, Inc. v. Department of the Air Force*, 566 F.2d 242 (D.C. Cir. 1977); *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976)(*Kleppe*); *Digital City Communications, Inc.*, 26 DOE ¶ 80,149 at 80,657 (1997); *Data Technology Industries*, 4 DOE ¶ 80,118 (1979). These requirements allow both the requester and this Office to determine whether the claimed exemption was accurately applied. *Tri-State Drilling, Inc.*, 26 DOE ¶ 80,202 at 80,816 (1997). It also aids the requester in formulating a meaningful appeal and facilitates this Office's review of that appeal. *Wisconsin Project on Nuclear Arms Control*, 22 DOE ¶ 80,109 at 80,517 (1992).

Thus, if an agency withholds material under Exemption 4 on the grounds that its disclosure is likely to cause substantial competitive harm, as in the present case, it must state the reasons for believing such harm will result. *Larson Associated, Inc.*, 25 DOE ¶ 80,204 (1996); *Milton L. Loeb*, 23 DOE ¶ 80,124 (1993). Conclusory and generalized allegations of substantial competitive harm, on the other hand, are unacceptable and cannot support an agency's decision to withhold requested documents. *Public Citizen*, 704 F.2d at 1291; *Kleppe*, 547 F.2d at 680 ("conclusory and generalized allegations are indeed unacceptable as a means of sustaining the burden of nondisclosure under the FOIA").

The Determination Letter cites two grounds for concluding that release of two audit reports contained in Volume III would cause the submitters competitive harm. Specifically, the Determination Letter contends that release of the audit reports "would provide competitors with insight into the strengths

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1/ In the present case, OR does not contend that the information it is withholding is privileged, but rather contends that it is confidential.

and weaknesses of [the DOE Contractor] and its partners and reveal internal accounting practices that are proprietary to these entities." Determination Letter at 2. These descriptions of withheld information are vague and unenlightening. Moreover, the Determination Letter fails to explain how such insights could be obtained and how such insights could be expected to cause the DOE Contractor and its partners substantial competitive harm. The Determination Letter's description of the remaining information it has withheld under Exemption 4 is also unduly vague in some instances. For example, some of the withheld information is described merely as "percentages" or "similar commercial and financial data." Determination Letter at 2.

The Determination Letter also indicates that it is withholding some information because its release would cause substantial competitive harm to the DOE Contractor and its partners, supposedly because its release would "reveal the strategies and methodologies employed by those entities in preparing the costing portions of proposals submitted for future government procurements." Determination Letter at 2. However, OR neither specifically indicates the nature of the information it claims would reveal its bidding strategy nor explains how such information could assist competitors to predict future bidding strategy. It is well settled that the mere fact that the contents of a document might be useful to competitors in future bids does not, by itself, constitute sufficient grounds to withhold the document. *Baker, Donelson, Bearman & Caldwell*, 27 DOE ¶ 80,164 at 80,655(1998) (citing *Morgan, Lewis & Bockius*, 20 DOE ¶ 80,165 at 80,688 (1990)). "A competitive injury is too remote for purposes of Exemption 4 if it can occur only in the occasional renegotiation of long term contracts." *Niagara Mohawk Power Corp. v. Department of Energy*, 169 F.3d 16, 18 (D.C. Cir. 1999). Moreover, the courts clearly mandate that in order to receive protection under Exemption 4, the expected harm must be substantial in nature. *See, e.g., National Parks and Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). Accordingly, Courts have not upheld protection under Exemption 4's competitive harm prong when agencies have been unable to convincingly show that release of information would be of substantial assistance to competitors attempting to estimate and undercut the submitter's future bids. *See, e.g., GC Micro Corp. v. Defense Logistics Agency*, 33 F.3d 1109 (9th Cir. 1994); *Acumenics Research and Technology v. United States Department of Justice*, 843 F.2d 800, 807 (4th Cir. 1988). While the law does not require OR to engage in a highly sophisticated economic analysis of the possible harm to the submitters that might result from disclosure, *see Public Citizen Health Research Group v. FDA* , 704 F.2d 1280 (D.C. Cir. 1983), in order to prevail, OR must meet its burden of showing substantial competitive harm to the bidders. OR has not met this burden.

Accordingly, we are remanding this portion of the appeal to OR for further processing. On remand, OR should either release the information it is currently withholding under Exemption 4 or provide a more thorough explanation of its basis for withholding that information. A sufficiently thorough explanation would provide a clear and specific description of the information being withheld and a specific explanation of why the release of the withheld information could reasonably be expected to result in substantial competitive harm to the person from which it was obtained. 2/

2/ Before releasing any of the information it is withholding, OR must, of course, notify the submitter of that information and provide it with an opportunity to explain how release of that information could cause it substantial competitive harm. Exec. Order No. 12,600, § 1.

B. Exemption 6

OR withheld information it describes as "salaries and similar personal financial information of contractor employees" under Exemption 6. Determination Letter at 1. Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether a record may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to this exemption. *Ripskis v. Department of Hous. and Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984) (*Ripskis*). Second, if privacy interests exist, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. *See Reporters Committee for Freedom of the Press v. Department of Justice*, 489 U.S. 769, 773 (1989) (*Reporters Committee*). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record would constitute a clearly unwarranted invasion of personal privacy. *See generally Ripskis*, 746 F.2d at 3.

The only justification OR provided for these withholdings states:

> We find that the release of salaries and similar personal financial information of contractor employees contained in Volume III is a serious invasion of personal privacy of those individuals and is not in the public interest.

Determination Letter at 1. As an initial matter, we note that "similar personal financial information" is much too vague a description to allow for meaningful review. 3/ Also, the justification given is much too conclusory and vague to allow for meaningful review. Accordingly, we are remanding this portion of the Appeal to OR for further processing. On remand, OR should either promptly release that information it is currently withholding under Exemption 6 or issue a new, more detailed and specific Determination Letter which fully describes the information it withholds, specifically identifies any privacy interests its release would violate and any public interests that might be served by its release, and specifically compares the importance of these interests to determine whether release would constitute a clearly unwarranted invasion of personal privacy.

3/ Moreover, OR must take care to ensure that the salary and financial information it is withholding under Exemption 6 can be attributed to particular individuals if released. If it cannot, it may not be withheld under Exemption 6.

III. CONCLUSION

Because OR has not met its burden of showing that it properly withheld information under Exemptions 4 and 6, we are remanding this matter to OR. On remand, OR must promptly issue a new determination letter. The new determination letter must either release to the Appellant the contents of Volume III it is currently withholding or provide a meaningful description of any portion of the contents of Volume III it determines to withhold under an appropriately justified FOIA exemption, in accordance with the instructions set forth above.

This is the third appeal which the Appellant has filed concerning the same FOIA request. In essence, the Appellant has had to file three appeals and has had to wait at least an additional 15 months for an appropriate resolution of its request. This result has been attributable to OR's inability or unwillingness to apply the established law. The Appellant's rights under the FOIA have been poorly served.

It Is Therefore Ordered That:

(1) The Appeal filed by Burkhalter, Rayson & Associates, Case No. TFA-0054, is hereby granted in part as set forth in Paragraph (2) and denied in all other aspects.

(2) The Appeal is hereby remanded to the Oak Ridge Operations Office for further proceedings in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: March 17, 2004